

DRAFT REGULATIONS

802 CMR 8.00: SUPPLIER DIVERSITY OFFICE CERTIFICATION

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8.01: Title and Applicability

802 CMR 8.00 shall govern the process of certification of minority, woman and minority/woman for-profit and non-profit business enterprises, followed by the Supplier Diversity Office (SDO), formerly known as the State Office of Minority and Women Business Assistance (SOMBWA), of the Operational Services Division's (OSD), a division of the Executive Office of Administration and Finance (A&F) of the Commonwealth of Massachusetts, pursuant to M.G.L. c. 7, §§ 57, 58, 59, and 61; 802 CMR 8.00 shall be construed to secure the just, speedy and fair determination of every matter and proceeding within its scope.

8.02: Definitions

Applicant Firm: A business structure or other entity owned at least 51% by an eligible applicant(s) who submits an application for Certification to the Supplier Diversity Office.

Burden of Proof:

- a) During The Initial Certification Process: A firm seeking certification has the burden of demonstrating to SDO, by a preponderance of the evidence, that it meets the Certification Criteria requirements, as defined herein.
- b) Certification Removal: If the SDO begins a decertification proceeding against a currently MBE/WBE certified firm and the firm appeals that decision, then the burden of proof shifts and the SDO must prove, by a preponderance of evidence, that the firm no longer satisfies the Certification Criteria requirements during a hearing before the SDO Appeal Board (See §8.10 SDO Appeal Board).

Certification Committee means: A Committee made up of the SDO Executive Director and two designees each of whom possess a thorough working knowledge of the SDO regulations and who have nothing to do with the original file review. The purpose of the Committee is to review and approve all initial certification, renewal and recertification requests in a timely, fair and uniform manner.

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Controlled means: One or more eligible principal(s) possess (es) the legal authority to make and in fact make, all major decisions of the applicant without being subject to any agreement or document restricting control, or the approval or veto of any other person, business enterprise, or organization which, by virtue of its business relationship to the applicant, may be in a position to influence the eligible principal's decisions. Although certain items may be delegated in the normal course of business, an eligible principal must remain ultimately responsible for:

- a) Maintaining dominant control over management, daily operations, and ensuring the continued compliance of the applicant firm with all required Massachusetts state licensing statutes;
- b) Possessing the demonstrable background, all legally required credentials, and the technical competence necessary to weigh all advice given and to make independent and unilateral determinations relating to the revenue generating activities of the applicant firm such as: key determinations relating to the day-to-day work of employees and workforce involved operationally and technically; although (an) eligible principal(s) must possess managerial experience and/or expertise needed to run the firm; where a critical license is held only by a non-eligible individual with an equity interest in the applicant firm, the non-eligible individual(s) may be found to control the firm;
- c) Demonstrating a thorough knowledge and ultimate control of the financial structure, policies, accounts and affairs of the applicant firm;
- d) Possessing dominant control over the hiring and firing of employees, including key employees, as well as any other personnel and workforce decisions of the applicant firm;
- e) The solicitation and negotiation of contracts, marketing, estimating, and the offering and acceptance or rejection of bids;
- f) Possessing dominant control over the purchase of goods, equipment, business inventory and services needed in the day-to-day operation of the applicant firm; and
- g) Maintaining dominant control over the applicant firm's governing body (if any) means:
 - i. For corporations, one or more eligible minority or women owner(s) must hold the highest officer position in the company (e.g., chief executive officer or president). Additionally, one or more eligible owner(s) of the same protected class must possess ultimate control over all decisions made by the corporation's Board of Directors.
 - ii. In a partnership, one or more eligible owner(s) of the same protected class must serve as general partner(s), with ultimate control over all partnership decisions.
 - iii. For LLCs/LLPs, one or more eligible owner(s) of the same protected class must serve as managing member(s), with ultimate control over all LLC/LLP decisions.
 - iv. For sole proprietorships, ownership and control must vest in an eligible minority or woman principal whose social security number appears on the signed federal Form 1040 Tax Return provided in connection with the firm's application for certification.
- h) The following factors must be considered in determining dominant control:
 - i. The eligible principal(s) shall not be found lacking dominant control solely on the basis of the terms of a franchise/license agreement that relate

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- to standardized quality, advertising or accounting format, as long as the franchisor or licensor is independent from the franchisee or licensee.
- ii. Eligible principal(s) shall not be found lacking dominant control solely on the basis of outside employment. However, if it can be shown that outside employment actually interferes with the eligible principal(s) ability to control the daily operations of the applicant firm's on a full-time basis, the applicant firm may not be certified.
 - iii. Eligible principal(s) shall not be found lacking dominant control solely on the basis of delegating tasks associated with making major decisions or performing daily operations of the applicant. However, such delegation of duties does not excuse the eligible principal(s) from the requirements enumerated in sections (b), (c), (d) and (g) of Controlled.
 - iv. Eligible principal(s) shall not be found lacking dominant control solely because their remuneration level may be lower than that of some other participants in the firm. Differences in remuneration will be considered in the context of the duties of the individual(s) involved, the firm's policy and practice concerning reinvestment of income, and any other explanations.
 - v. Eligible principal(s) shall not be found to exercise dominant control if the applicant firm does not meet the requirements of "Independent", as defined herein.

Credentials means: Documentary evidence of an eligible principal(s)' lawful authority, commonly in the form of letters, licenses or certificates which on their face indicate the legal authority and capacity of the bearer.

Criteria for the Certification of a For-profit Organization means: For the certification of a for-profit minority business enterprise and/or a for-profit woman business enterprise, the entity must be:

- a) Both at least 51 percent (%) owned and controlled by the same eligible principal(s) (Minority-Owner and/or Woman-Owner);
- b) Free of any conversion rights;
- c) Independent; and
- d) Ongoing.

Criteria for the Certification of a Non-profit Organization means: For the certification of a non-profit organization:

- a) The applicant firm must be tax-exempt under either § 501(c)(3) or § 501(c)(4) of the United States Internal Revenue Code;
- b) The applicant must be in compliance with, and in good standing legally under, the laws of its governing jurisdiction and any filing requirements of the Public Charities Division of the Office of the Attorney General of the Commonwealth of Massachusetts;
- c) One or more eligible persons must constitute 51% or more of the applicant's voting membership, if any, and 51% or more of its board of directors;
- d) The applicant must be independent, and controlled by one or more, minorities, women or minority/women;
- e) The applicant firm must be ongoing; and

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- f) Protected classes for non-profit certification include adult minorities and women. The classes cannot be combined to meet the 51% threshold specified in the Eligible Principal and ownership requirements.

Eligibility of Ownership Held Through a Personal Trust means: For a personal trust to qualify for SDO certification, the trust must hold at least a 51 percent (%) ownership interest in favor of an eligible minority or female principal. The Applicant Firm must satisfy all remaining Certification Criteria. In addition, a minority and/or woman owned firm whose assets are held in a personal trust may be eligible for certification under the following circumstances:

- a) When the trust is irrevocable: Trustee is an Eligible Principal who is also one of the beneficiaries; All beneficiaries whose total beneficial interest is 51% or more are Eligible Principals.
- b) When the trust is revocable: Settlor is an Eligible Principal; Trustee(s) is an Eligible Principal who is also one of the beneficiaries; All beneficiaries whose total beneficial interest is 51% or more are Eligible Principals.

Eligibility of Ownership Held Through a Business Trust (established under M.G.L. c. 182) means: One or more Eligible Principals maintain ownership of 51 percent (%) or more of transferable certificates of participation and serve as trustee(s). The Applicant Firm must satisfy all remaining Certification Criteria.

Eligible Applicant/Eligible Principal: A Minority-Owner and/or a Woman-Owner of the Applicant Firm, who is either a US citizen or lawful permanent resident over eighteen (18) years of age, and:

- a) If the applicant firm is for-profit, the same eligible minority (ies) and/or woman (women) principal(s) must both dominantly own and control the applicant firm. The protected classes cannot be combined to satisfy the applicant firm definition.
- b) If the applicant firm is a non-profit organization then the minority person or woman must control, or is among the persons, who control the daily operations of the non-profit organization. For multiple member non-profit firms, their members must fit into the same protected class (either minorities or women, not both) and the protected class as a whole must control the daily operations of the non-profit organization. The protected classes cannot be combined to satisfy the applicant firm definition.
- c) If the applicant firm is a joint venture of two (2) or more business enterprises that would otherwise both be eligible for certification in the same protected class (either minorities or women, not both) and who have joined together for a specific contract of limited duration, then the firm may be eligible for certification if they meet all criteria for certification.
- d) In all cases, 50% ownership by an eligible woman owner and 50% ownership by an eligible minority male principal cannot be combined to satisfy SDO ownership thresholds.

Executive Director means: The Executive Director of the Supplier Diversity Office (“SDO”).

Free from Conversion Rights means: Neither the applicant firm nor the eligible principal(s) is (are) subject to any right, agreement, option, scheme or document that creates or is representative of any right, which, if exercised, would result in diluting the

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ownership of the eligible principal(s) in the Applicant Firm below 51% or cause the applicant firm to not be independent or controlled by one or more eligible principal(s).

Independent means:

- a) That the applicant firm is not dependent upon, affiliated with, or influenced by, legally or in practice, an ineligible person, business enterprise or organization in connection with any key elements of its day-to-day or long-term affairs, including contracts, sales, operations, technical affairs, equipment, facilities, supplies, employees, workforce, consultants, subcontracts, leases, financing, income, payroll, bookkeeping, goodwill, policies or management;
- b) That the applicant firm does not rely on or regularly utilize to perform work it contracts to perform any employee or workforce who, while performing work for the applicant firm that, is in the course of employment with or under the direct control of a person, business enterprise or organization other than the applicant firm, with the exception of temporary office personnel working in the normal course of the applicant firm's activity(ies);
- c) That the applicant firm does not rely on or regularly utilize to perform work it contracts to perform any management or supervisory personnel other than those person(s) it directly employs and controls;
- d) An applicant firm shall not be considered independent if it presents insufficient evidence of having the capability or capacity to perform, with its own workforce, equipment, facilities or other functional assets the work it contracts to perform;
- e) The temporary employment or direct control by another person, business enterprise or organization of an Applicant's Firm's employee(s) or workforce does not by itself constitute a lack of independence if the Applicant Firm is a temporary employment service and the temporary employment or control of the employee(s) or workforce occurs in the normal course of the Applicant Firm's business; and
- f) Any one of the following conditions creates a rebuttable presumption that the Applicant Firm is not independent:
 - i. One or more eligible principal(s) is(are) currently an employee of a non-minority or non-woman owned or controlled business enterprise or organization which has a direct or indirect financial or controlling interest in, or influence on, the applicant firm; or
 - ii. One or more of the governing body members, officers, management officials, key employees or supervisory personnel of the applicant firm are substantially the same as in a non-minority, and/or non-woman owned and controlled business enterprise or organization which maintains a direct or indirect financial or controlling interest in, or influence on the applicant firm; or
 - iii. The applicant firm operates as a subsidiary or affiliate of a non-minority, and/or non-woman owned and controlled business enterprise or organization; or
 - iv. One or more eligible principal(s), or the applicant firm, is/are a former employee(s), employer(s), affiliate(s) or subsidiary(ies) of a person, business enterprise or organization that is in the same or related industry as the applicant and which:
 - (a) maintain(s) a direct or indirect financial or controlling interest in, or influence on, the applicant firm; or

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- (b) assisted or assists one or more eligible principal(s) or the applicant firm to obtain or use any of its financial or non-financial resources that the applicant firm uses.

Minority means an eligible principal who meets one or more of the following definitions:

- a) American Indian or Native American means: all persons having origins in any of the original peoples of North America and who are recognized as an Indian by a tribe or tribal organization.
- b) Asian means: All persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian sub-continent, or the Pacific Islands, including, but not limited to China, Japan, Korea, Samoa, India, and the Philippine Islands.
- c) Black means: All persons having origins in any of the Black racial groups of Africa, including, but not limited to, African-Americans, and all persons having origins in any of the original peoples of the Cape Verdean Islands.
- d) Eskimo or Aleut means: All persons having origins in any of the peoples of Northern Canada, Greenland, Alaska, and Eastern Siberia.
- e) Hispanic means: All persons having their origins in any of the Spanish-speaking peoples of Mexico, Puerto Rico, Cuba, Central or South America, or the Caribbean Islands.
- f) Cape Verdean means: All persons of Cape Verdean origins;
- g) Portuguese means: All persons having Portuguese origin. Portuguese persons shall only be included in the definition of minority if specifically set forth in programs funded by state transportation bond statutes which include such persons as eligible participants; or
- h) Other racial or ethnic groups allowed by law or legal agreement.

Ongoing means:

- a) In all cases, that the applicant firm was not formed, reformulated, changed or reorganized within the last twelve (12) months solely to take advantage of a special program developed to assist minority, woman or minority/woman businesses, or non-profit organizations.
- b) The SDO will consider, when making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the MBE and/or WBE program(s). Evidence may include but is not limited to debarment orders, or indictments issued by a state or federal certification agency or a similar order issued by a court of competent jurisdiction.
- c) If the applicant firm is a business enterprise, it means being actively in business, and owning or leasing the resources that are typical for a business enterprise in its industry, that ensures Applicant Firm's ability to manufacture products or provide services in the field of requested certification without heavily relying on resources of any other ineligible individual, business enterprise or organization, and having facilities that are appropriate for conducting a business of its type at the present stage of its development, and regularly and actively seeking contracts, orders, or sales of the applicant's products or services.
- d) If the applicant firm is a non-profit organization, it means regularly and actively engaging in the non-profit activities for which it was formed.

Out-of-state Applicant or Out-of-state Applicant Entity means: An applicant or entity whose principal place of business is other than Massachusetts. All out-of-state firms must

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be certified as a MBE, a WBE or a DBE by a government entity or the US Department of Transportation (US DOT) in its home state to obtain and to retain certification.

All out-of-state firms or their home state certifying entity must provide SDO with a current certification letter and site visit report. Failure to provide these items to the SDO in a timely manner will halt any further review of an initial application. Certified firms may be decertified following a show cause hearing if these items are not provided in a timely manner

Owner and Owned means:

a) By business type:

- i. Corporation: one or more eligible principal(s) maintain(s) ownership of 51% or more of each type and class of outstanding stock of the corporation, including voting stock, and 51% or more of the aggregate of all types and classes of outstanding stock of the corporation.
- ii. Partnership, Limited Liability Company (LLC): one or more eligible principal(s) maintain(s) ownership of 51% or more of the total partnership (LLC or joint venture) interest, including all assets, benefits, distribution rights, tax credits, deductions and postponements, and a commensurate share of the partnership's (LLC's or joint venture's) liabilities and obligations.
- iii. Massachusetts Business Trust (established under M.G.L. c. 182): one or more eligible principal(s) maintain(s) ownership of 51% or more of transferable certificates of participation and serve as trustee(s).
- iv. Sole Proprietorship: the eligible principal maintains sole ownership of all of the proprietorship assets, and being personally and solely at risk and obligated for all of its losses and liabilities.
- v. All Businesses: The eligible principal(s) must possess the right to and actually receive the level and kind of profit and benefits and enjoy customary incidents of ownership, if any, that are commensurate with the level and kind of ownership reflected in the ownership documents; the eligible principal(s) must be at risk for, and actually incur, losses, if any, of the business enterprise in the manner and to the extent which is commensurate with the level and kind of ownership reflected in the ownership documents; the eligible principal's(s') ownership must be continuing; and the certification criteria must be met in substance as well as form. Profits, dividends, salaries, debt repayments, retained earnings and distributions of any kind (including distributions upon liquidation) are included among all of the indicators which may be considered.

- b) The firm's ownership by eligible principal(s) must be real, actual, genuine and meaningful, going beyond "paper" ownership as reflected in ownership documents. The eligible principal(s) must enjoy the customary incidents of ownership, and share in risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form.
- c) The contribution of capital or expertise by the eligible principal(s) to acquire their ownership interest(s) must be real and substantial. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not by themselves render a firm ineligible, even if the debtor's ownership interest is security for the loan.

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- d) In addition to a significant financial investment in the firm, including but not limited to, capital, equipment, contribution of property, space, patents, or copyrights, eligible principal's irreplaceable expertise may be credited towards required contribution only if it is of outstanding quality, in the areas critical to the firm's operations and indispensable to the firm's potential success. Said expertise will be considered in light of the totality of all relevant circumstances and counted only if accompanied by a significant financial stake and clearly documented by the firm's records.
- e) Contribution of capital shall not be regarded as lacking "real" and "substantial" attributes solely because a(an) eligible principal(s) acquired a controlling ownership interest(s) in the applicant firm as a result of a gift, or transfer without adequate consideration unless there is a reason to believe that the transfer in question took place for the sole purpose of certification eligibility.
- f) A particularly thorough scrutiny to the ownership and control of the firm in light of totality of the circumstances shall be conducted to ensure that it is owned and controlled, in substance as well as in form, by an eligible principal as opposed to a non-eligible transferor. In addition, where an ineligible transferor (whether or not an immediate family member) remains involved with the firm in any capacity, the eligible principal(s) now owning the firm must demonstrate that the transfer of ownership and/or control to the eligible individual was made for reasons other than obtaining certification.

Principal(s) means: A(n) owner(s) of an Applicant Firm.

Woman-Owner of an Applicant Firm means: An adult female who is either an adult US citizen or lawful permanent resident of the US over eighteen (18) years of age.

8.03: Certification

SDO shall certify and maintain a list of certified minority, women, minority/women for-profit and non-profit business enterprises which meet the applicable Certification Criteria. The burden of proof shall be on the Applicant Firm to show, by a preponderance of the evidence, that it meets each element of the Certification Criteria.

SDO shall review and act upon applications submitted to the agency within 30 business days of final submission of all necessary information or as promptly as administratively feasible but not to exceed sixty (60) days. The Certification Committee shall be responsible for all certification related initial determinations except if the Executive Director specifically designates an alternate certification process for qualified firms. An entity's certification shall last for two (2) years or until the entity is recertified, has its certification renewed or is decertified. No cause of action shall lie against the Commonwealth, or any employee or agent thereof, for failure to meet any projected time line.

8.04: Reciprocity

This section applies with respect to any firm that is currently certified in Massachusetts as a Disadvantaged Business Enterprise (DBE) firm. When a firm currently DBE certified in Massachusetts applies to the State for MBE, WBE or M/WBE certification, it is at discretion of the Supplier Diversity Office to accept the DBE certification and certify the

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firm, without further procedures. To obtain certification in this manner, the firm must request the specific certification and grant written permission to the SDO Director of Certification or her/his designee for the DBE program to provide a full copy of the DBE application, site visit, certification letter and all updated associated financial data to the State certification program staff.

8.05: Current Circumstances

SDO must evaluate the eligibility of a firm on the basis of present circumstances. SDO must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control, ongoing status or independence by an otherwise eligible minority or woman in the past if the firm currently meets the above mentioned certification standards. Additionally, the SDO may not refuse to certify a firm solely on the basis that it is a newly formed firm

8.06: Certification Category

SDO will assign to certified entities a business description denoting the activity(ies) in which the entity is engaged. An entity may obtain an expansion or change of its business description provided it meets all relevant certification criteria for the new category of endeavor as well as the criteria for the company overall. Category listings are not intended to reflect the level of competency of any Applicant Firm to perform the activity(ies) in which it engages.

8.07: Recertification and Certification Renewal

To remain in good standing, every firm must have its certification renewed every two (2) years and undergo a substantive recertification review after every six (6) years. Certification renewal requires the submission of specified update information and does not ordinarily entail a full substantive review. SDO retains the discretion to conduct such a review if circumstances dictate.

If an entity is due for recertification or certification renewal and fails to submit the requested recertification or certification renewal information within the allotted time period after reasonable notice has been provided, that entity's certification automatically shall be terminated. Failure to supply all requested information needed for MBE/WBE renewal and/or recertification within given deadlines shall be prima facie evidence of a firm's desire to no longer participate in the certification program.

Grounds for Removal of Certification: Any action to remove certification of a currently certified firm needs to be triggered by one of the following events:

- a) Changes in a firm's circumstances since its original SDO certification which render a firm currently unable to meet MBE/WBE certification guidelines;
- b) Information or evidence not available to SDO at the time the firm was certified;
- c) Information that was concealed or misrepresented by a firm in previous SDO certification actions;
- d) A change in the certification standards or requirements by SDO since the firm was originally MBE or WBE certified;
- e) A documented finding that SDO's initial determination to certify the firm was factually erroneous; or

- f) Failure to Cooperate by the certified firm.

8.08: Out-of-State Firms

An out-of-state applicant or certified entity must be certified by a government entity in its home-state and the home state must provide SDO with a copy of a home-state site visit report from a home state certifying government agency or the United States Department of Transportation (US DOT) to become and remain eligible for SDO certification. Proof of home state certification and a copy of a home state site visit report may be requested at any stage of SDO review. Failure to provide these items in a timely manner is sufficient grounds to deny or remove certification. In the event the home-state does not conduct site visit reports, the out of state applicant may elect to reimburse the Commonwealth for travel expenses to comply with certification regulations for out of state firms. If the out of state applicant is not certified by their home state due to the home state not having an MBE/WBE program, the applicant firm will not be eligible to apply for SDO certification and subsequently will be denied.

8.09: Duty to Cooperate; Requirements to Remain in Good Standing; Disqualification; and Biennial Renewal Affidavit

Cooperation. Applicants and certified entities shall cooperate fully with the certification program and provide accurate, complete and non-misleading information in relation to its application or certification status. The failure of an applicant or certified entity to cooperate with an investigation, site visit, request for information or other certification-related matter or proceeding constitutes grounds for denial of certification or decertification. SDO may request an applicant or certified entity to provide additional information when SDO deems it necessary for a certification-related determination.

Requirements to Remain in Good Standing. If the SDO forms a reasonable belief that a currently certified firm's ability to satisfy any of the Certification Criteria identified above is compromised, based on newly discovered evidence, including, but not limited to, allegations or evidence of fraud, material misrepresentation or a change in circumstances, then the SDO may monitor, investigate and do random spot checks of any such certified firm. If an entity fails to continue to meet the requirements for certification, SDO may issue the entity notice to show cause why it should not be decertified and, after an opportunity for a hearing, SDO may decertify the entity. SDO may bar from the certification program for a period of up to five (5) years any entity that is denied certification or is decertified for failure to cooperate or for the submission of false, materially incomplete or misleading information. SDO may bar from the certification program for a period of up to one (1) year any entity which is decertified for failure to meet the substantive requirements for certification. Any entity that is denied certification or decertified may take corrective action to meet the applicable certification criteria.

Disqualification. The SDO may disqualify a firm from certification that is currently subject to any state or federal debarment order or determination. The term of the disqualification may be coterminous with the term of the debarment.

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Biennial Renewal Affidavit: Every two (2) years, the 51% owner(s) of a currently certified firm will provide the SDO with a notarized statement in a Renewal Affidavit made under the pains and penalties of perjury that indicates:

- a) If there have been any material changes in the Applicant Firm's Certification Criteria, including but not limited to changes in Ownership, Control, Independence, Ongoing and Freedom from Conversion Rights or the Outside Employment of one or more eligible principals
- b) Whether the firm has been MBE or WBE decertified in any other jurisdiction;
- c) Whether the Eligible Principal(s) or the Applicant Firm are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions in connection with a public contracting opportunity by any State or Federal agency in Massachusetts or any other jurisdiction;
- d) Whether the Eligible Principal(s) or the Applicant Firm have been: convicted of, indicted for, had a judgment rendered against them or otherwise been criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any criminal or civil infraction, including but not limited to any act of violence, fraud, embezzlement, theft, forgery, bribery, nonpayment of wages, payroll or business taxes, falsification or destruction of records, material misrepresentation, making false statements, or receiving stolen property or any other act which constitutes a felony under state or federal law;
- e) Whether the Eligible Principal(s) or the Applicant Firm have: within a two-year (2) period preceding the renewal affidavit been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, performing or attempting to perform a public (Federal, State or local) transaction or contract under a public transaction; and
- f) Whether the Eligible Principal(s) or the Applicant Firm have had one or more public contracting transactions (Federal, State or local) terminated for cause or default within the two-year (2) period immediately preceding the renewal affidavit.

8.10: SDO Appeal Board

1. Right to an Appeal: Firms have the right to appeal under the following circumstances:
 - a) If an initial application for certification is denied by the Certification Committee; or
 - b) If the Certification Committee recommends that a currently certified firm no longer meets the Certification Criteria, as defined herein;

All appeals must be filed within ten (10) business days of receipt of a letter outlining the appeal options described above. This will entitle the Appellant to an administrative appeal hearing before the independent SDO Appeal Board (SAB). See section 8.02 for the definition of Burden of Proof, which differs based on whether the appeal is by an initial certification applicant or a currently Certified Firm.

2. Certification Status During An Appeal: If a firm that initially applied for certification is denied MBE or WBE status, the firm is not certified as a MBE/WBE until the SAB renders a written decision. A currently certified firm remains an eligible MBE or WBE during a pending SAB proceeding to remove its eligibility. The firm does not become ineligible until the SAB issues a written determination to that effect.
3. Informal Review: Prior to the formal SAB hearing, an aggrieved applicant or entity may request an informal review of their file. The purpose of the review, whenever possible, is to simplify or resolve issues prior to a full-blown hearing before the SAB. OSD Legal

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Counsel will provide an applicant with written notice of the availability of an informal review, if appropriate. If issues remain unresolved at the conclusion of the informal review, then the SDO will proceed with a formal hearing before the SAB.

4. Scope of SAB Review and SAB Decisions: The SAB's decision is based on the totality of the circumstances. The primary basis for consideration is whether the SDO decision is supported by clear and substantial evidence. Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion, taking into account whatever in the record fairly detracts from its weight. The SAB decision will be provided in writing within ninety (90) business days following the conclusion of the hearing. The SDO will then provide the written decision to the firm, and to the out of state certification agency, or the SBA (if applicable).
5. Submission without a Hearing: Any aggrieved party with appeal rights may elect to waive a hearing and to submit any documents without appearing at the time and place designated for the hearing. Submission of a case without a hearing does not relieve the Parties from supplying all documents supporting their allegations or defenses. Affidavits and stipulations may be employed to supplement other documentary evidence in the record.
6. SAB Composition: The SAB shall be comprised of at least three (3) appointees of the SDO Executive Director and the OSD/SDO General Counsel, which may include the following individuals or their designees: Assistant Secretary of the Office of Access and Opportunity, the Chairperson of the Mass Commission Against Discrimination, the CEO/President of a Massachusetts Civil Rights Organization and/or a Representative from a Minority and/or Women Business Group, or their designee. At least one of the SDO Appeal Board members in attendance at each hearing must be a licensed attorney.
7. Formal Hearing Authority: Hearings shall be held in accordance with the Informal Fair Hearing Rules, Codified at 801 CMR §§ 1.02, 1.03, and the applicable sections of M.G.L. c.30A.
8. Transparency of Decisions: For transparency's sake, any information the SDO provides to the SAB shall also be made available to the Applicant Firm and any third-party complainant involved, consistent with applicable Federal or state laws concerning freedom of information, confidentiality and privacy. The SAB makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source.
9. SDO Reapplication: Any firm denied (or removed) MBE or WBE certification by the SAB for any reason may not reapply for certification for a period of eleven (11) months following the date of the most recent SAB decision.

8.11: Severability

If any provision of 802 CMR § 8.00 is declared or found to be illegal, unenforceable or void, then Applicant Firms shall be relieved of all obligations under that provision only, and all other provisions of 802 CMR § 8.00 shall remain in full force and effect.

REGULATORY AUTHORITY

802 CMR § 8.00: M.G.L. c. 7, §§ 57, 58, 59, 61; Executive Order No. 524.